

BRB No. 09-0254 BLA

OMIE E. NEAL)	
(o/b/o and as Survivor of WILLIAM R.)	
NEAL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
HONEYWELL INTERNATIONAL,)	DATE ISSUED: 11/16/2009
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Lifetime and Survivor Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Lifetime and Survivor Benefits (2006-BLA-5996 and 2006-BLA-5997) of Administrative Law Judge Thomas M. Burke, rendered on a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative law judge adjudicated these claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge noted that employer stipulated to twenty-five years of coal mine employment, and conceded the existence of pneumoconiosis.² 20 C.F.R. §7818.202(a). Because employer conceded the existence of clinical pneumoconiosis based on biopsy evidence, the administrative law judge found that it conceded that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309 in the miner's subsequent claim. In considering the claims on the merits, the administrative law judge also found that the x-ray and medical opinion evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), but that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(3), based on the presumptions contained therein, and that the medical opinion evidence did not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Overall, the administrative law judge found pneumoconiosis established at 20 C.F.R. §718.202(a). In addition, the administrative law judge found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), which was not rebutted. The administrative law judge also found that the evidence of record established total disability due to pneumoconiosis in the miner's claim pursuant to 20 C.F.R. §718.204(b), (c), and death due to pneumoconiosis in the survivor's claim pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims.

On appeal, employer asserts that the administrative law judge erred in finding that the miner's disability was due to pneumoconiosis pursuant to Section 718.204(c) and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.³

¹ Claimant, the widow of the miner, is pursuing both the miner's subsequent claim and her survivor's claim. The miner died on September 17, 2005, during the pendency of his June 2, 2003 subsequent claim. Claimant filed a claim for survivor's benefits on November 14, 2005. Director's Survivor's Exhibit 2.

² In its brief, employer states that it stipulated to only 11.73 years of coal mine employment; however, the hearing transcript reflects a stipulation to twenty-five years of coal mine employment. Hr. Tr. at 7.

³ The administrative law judge's findings, that the miner had clinical pneumoconiosis, that the clinical pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled, pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b) are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision awarding benefits on both the miner's and the survivor's claims is rational, supported by substantial evidence, and in accordance with law and is, therefore, affirmed.

MINER'S CLAIM

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish any element of entitlement. Consequently, claimant had to submit new evidence establishing one of the elements of entitlement to establish a change in an applicable condition of entitlement in the miner's claim and obtain review of the miner's claim on the merits. 20 C.F.R. §725.309(d)(2), (3). In this case, as employer conceded the existence of clinical pneumoconiosis, the administrative law judge found that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Turning to the merits of the miner's claim, the administrative law judge found, based on all of the record evidence, that the clinical pneumoconiosis arose out of coal mine employment, that the miner was totally disabled,

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in coal mining in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

and that the miner's total disability was due to clinical pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b) and (c).

The sole issue challenged by employer in the miner's claim is the administrative law judge's finding that disability causation was established at Section 718.204(c). In finding that disability causation was established, the administrative law judge found that, of the four pulmonologists who provided reports in this case, only Drs. Rasmussen and Crisalli provided opinions on the issue of disability causation. The administrative law judge noted that, although Dr. Gaziano diagnosed a moderate degree of pulmonary function impairment and coal workers' pneumoconiosis, he failed to offer an opinion as to whether the miner's total disability was due, in whole or in part, to coal worker's pneumoconiosis. Likewise, the administrative law judge noted that, while Dr. Renn diagnosed coal workers' pneumoconiosis, in addition to other respiratory impairments,⁵ the doctor did not offer an opinion as to whether the miner's coal workers' pneumoconiosis contributed to his total disability.

The administrative law judge next turned to the opinions of Drs. Rasmussen and Crisalli, who addressed the cause of the miner's disabling respiratory impairment. The administrative law judge noted that Dr. Rasmussen identified three potential causes of the miner's totally disabling respiratory impairment, *i.e.*, smoking, coal dust exposure and the surgical removal of lung tissue as a result of the miner's lobectomy.⁶ The administrative law judge found, however, that Dr. Rasmussen concluded that smoking and coal dust exposure, which destroy lung tissue, were the causes of the miner's total respiratory disability, and that the miner's lung surgery was of little significance in causing his totally disabling respiratory impairment. The administrative law judge noted that, ultimately, Dr. Rasmussen concluded that the miner's coal dust exposure was a significant contributing factor of his totally disabling respiratory impairment. Further, the administrative law judge concluded that Dr. Rasmussen's finding was supported by the pathology evidence showing that the miner had severe coal workers' pneumoconiosis.

Turning to Dr. Crisalli's opinion, that the miner's totally disabling respiratory impairment was not related to coal dust exposure, the administrative law judge gave the opinion little weight because the doctor found, contrary to the evidence, that the miner

⁵ In addition to coal workers' pneumoconiosis, Dr. Renn diagnosed a moderate to moderately severe, significant reversible obstructive pulmonary disease due to bullous emphysema; chronic bronchitis, asthma, and an abnormal diffusion capacity due to bullous emphysema and right upper lobectomy. Employer's Survivor's Exhibit 2.

⁶ The record shows that the miner underwent a right upper lobectomy of his lung due to lung cancer on August 19, 2002.

did not have coal workers' pneumoconiosis. Specifically, the administrative law judge noted that, in addition to his negative x-rays readings, Dr. Crisalli found that the pathology reports did not support a diagnosis of coal workers' pneumoconiosis. The administrative law judge noted, however, that Dr. Crisalli's finding was contradicted by the opinion of Dr. Sobieski. Dr. Sobieski, the pathologist who conducted the miner's biopsy, found that the lung tissue showed very severe features of a coal dust/mixed dust pneumoconiosis consistent with coal workers' pneumoconiosis. Director's Exhibit 24. The administrative law judge also noted that a second pathologist, Dr. Stefanini, reviewed the pathology report as well as tissue slides and found that they showed simple coal workers' pneumoconiosis, sufficiently severe to cause impairment of lung function. Claimant's Exhibit 5. In addition, the administrative law judge noted that Dr. Crisalli's opinion was contradicted by the weight of the x-ray evidence, which was positive for coal workers' pneumoconiosis. The administrative law judge, therefore, credited the opinion of Dr. Rasmussen over the opinion of Dr. Crisalli, and found that it established disability causation at Section 718.204(c).

Employer first contends that, in evaluating the medical opinion evidence on the issue of disability causation, the administrative law judge erred in finding that Dr. Renn did not address disability causation. Specifically, employer contends that, inasmuch as Dr. Renn diagnosed coal workers' pneumoconiosis, but did not include it as a cause of the miner's respiratory symptoms, as he did smoking, his opinion should have been treated as if he found that the miner's disability/respiratory impairment was due to smoking, and not due to coal workers' pneumoconiosis.

In considering Dr. Renn's opinion, the administrative law judge noted that Dr. Renn diagnosed, in addition to coal workers' pneumoconiosis, cancer, emphysema due to smoking, chronic bronchitis due to smoking with asthmatic component, and moderate to moderately severe, reversible obstructive defect due to emphysema and bronchitis caused by smoking. The administrative law judge correctly noted however, that Dr. Renn failed to offer an opinion as to whether the miner's coal workers' pneumoconiosis contributed to his disability or moderately severe ventilatory defect. We conclude, therefore, that the administrative law judge acted within his discretion, as fact-finder, in not weighing Dr. Renn's opinion along with the opinions of Drs. Rasmussen and Crisalli on the issue of disability causation. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Employer's argument is, accordingly, rejected.

Employer also contends that the administrative law judge erred in finding that the pathology evidence supported Dr. Rasmussen's opinion that the miner's totally disabling respiratory impairment was due to coal workers' pneumoconiosis. Specifically, employer contends that the administrative law judge should have credited the opinion of Dr. Naeye, a reviewing pathologist, who found: that the pathology evidence only supported a finding of very mild, simple coal workers' pneumoconiosis; that the miner's "coal workers'

pneumoconiosis was far too mild to be producing any measurable abnormalities in lung function;” and that “[w]hatever abnormalities the miner had in lung function can be attributed to his many years of cigarette smoking.” Employer’s Survivor’s Exhibit 1; Employer’s Brief at 30. Additionally, employer contends that the administrative law judge erred in crediting Dr. Stefanini’s pathology opinion over that of Dr. Naeye, because of Dr. Stefanini’s qualifications and because his opinion was corroborated by Dr. Sobieski’s pathology opinion. Employer contends that this was error because Dr. Naeye’s qualifications are identical to Dr. Stefanini’s, and Dr. Sobieski’s qualifications were not in the record.⁷

In crediting the pathology report of Dr. Stefanini over that of Dr. Naeye, the administrative law judge acknowledged that both physicians are Board-certified in clinical and anatomic pathology. However, he credited the report of Dr. Stefanini, who found that the miner’s tissue slides showed coal workers’ pneumoconiosis sufficiently severe to cause impairment in lung function, because it was corroborated by the report of Dr. Sobieski, who conducted the biopsy. Dr. Sobieski found that the tissue slides showed “severe features of coal dust/mixed dust pneumoconiosis consistent with simple coal workers’ pneumoconiosis.” Director’s Exhibit 24. Contrary to employer’s argument, the administrative law judge was not required to accord less weight to the opinion of Dr. Sobieski and, therefore, less weight to the opinion of Dr. Stefanini, because Dr. Sobieski’s qualifications were not in the record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Further, contrary to employer’s argument, the administrative law judge could accord greater weight to the opinion of Dr. Stefanini, even though he and Dr. Naeye were both Board-certified in anatomic and clinical pathology, as Dr. Stefanini’s opinion was corroborated by the opinion of another pathologist. *See Clark*, 12 BLR at 1-155. Employer’s argument, is, therefore, rejected.

In conclusion, we affirm the administrative law judge’s finding that the opinion of Dr. Rasmussen was sufficient to establish disability causation at Section 718.204(c), on the ground that, it was better supported by the evidence of record than was the opinion of Dr. Crisalli. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d at 270, 22 BLR 2-384. Accordingly, we affirm the administrative law judge’s finding of disability causation at Section 718.204(c) and the award of benefits in the miner’s claim.

⁷ The administrative law judge noted that both Drs. Naeye and Stefanini are Board-certified in clinical and anatomical pathology, and that Dr. Stefanini is also Board-certified in clinical hematology, medical chemistry, and blood banking. *See Decision and Order* at 6.

SURVIVOR'S CLAIM

To establish entitlement to survivor's benefits pursuant to Section 718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202; 718.203; 718.205. Failure to establish any one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivor's claims filed on or after January 1, 1982, the cause of death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, pursuant to Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-980, 16 BLR 2-90, 2-93 (4th Cir. 1992).

The evidence relevant to death causation consists of the following: The death certificate signed by Dr. Almehmi, the miner's attending physician at the time of his death, lists the immediate cause of death as respiratory failure/arrest. Conditions leading to the immediate cause of death are listed as klebsiella pneumonia due to chronic obstructive pulmonary disease due to pneumoconiosis. Director's Survivor's Exhibit 11. Dr. Gaziano opined that the miner's occupational pneumoconiosis was a very significant factor in his end-stage lung disease, and in his demise. Claimant's Exhibit 4. Dr. Stefanini reviewed the biopsy slides, agreed with Dr. Sobieski's assessment, and concluded that while coal workers' pneumoconiosis did not cause the miner's death, it did cause an impairment in the miner's pulmonary function that hastened his death. Director's Exhibit 24. Dr. Naeye stated that the miner died from lung cancer and coronary artery disease, and that his very mild coal workers' pneumoconiosis did not cause or hasten his death. Employer's Exhibit 1. In discussing the evidence on the issue of death causation, Dr. Renn opined that the miner's simple coal workers' pneumoconiosis did not cause or contribute to his demise. Employer's Survivor's Exhibit 2.

In finding that coal workers' pneumoconiosis hastened the miner's death pursuant to Section 718.205(c), the administrative law judge credited the opinion of Dr. Gaziano over the opinion of Dr. Renn, noting that Dr. Gaziano's opinion was supported by the pathology findings of Drs. Sobieski and Stefanini, as to the severity of the miner's coal workers' pneumoconiosis. In particular, the administrative law judge noted that while Dr. Naeye referred to medical studies showing no connection between cancer and coal dust exposure, Dr. Naeye did not offer an opinion as to the effect coal workers'

pneumoconiosis had on the miner's death. The administrative law judge, therefore, accorded little weight to the opinion of Dr. Naeye.⁸

Employer argues, however, that the administrative law judge erred in finding that the medical evidence established death causation at Section 718.205(c). Specifically, employer contends that the administrative law judge erred in crediting Dr. Stefanini's opinion over that of Dr. Naeye for the same reason we rejected in our discussion concerning disability causation in the miner's claim; *i.e.*, Dr. Stefanini's opinion was corroborated by the opinion of Dr. Sobieski, the pathologist who conducted the biopsy. *See infra* at 9-10. Employer further argues that Dr. Naeye's opinion is entitled to greater weight because "he apparently had a more extensive set of records to review." Employer's Brief at 32. This factor alone, however, is not dispositive, inasmuch as the administrative law judge discussed all of the evidence relevant to death causation and weighed its credibility. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Although employer challenges the weight accorded the conflicting medical opinions as to death causation, employer's assertions of error on appeal amount to a request that the Board reweigh the evidence, which it is not empowered to do. *Anderson*, 12 BLR at 1-113. We conclude, therefore, that the administrative law judge acted within his discretion in reaching his credibility determinations in this case. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Clark*, 12 BLR at 1-155. Thus, we affirm the administrative law judge's decision to assign controlling weight to the opinions of Drs. Gaziano and Stefanini regarding death causation pursuant to Section 718.205. *Hicks*, 21 BLR at 2-340. We further affirm the administrative law judge's finding that Dr. Naeye's opinion was of little value because, while Dr. Naeye relied on evidence that the miner's cancer was unrelated to coal dust exposure, he did not address whether the miner's coal workers' pneumoconiosis contributed to his death. *See Scott*, 289 F.3d at 270, 22 BLR at 2-384; *Clark*, 12 BLR at 1-155. Similarly, the administrative law judge permissibly rejected the opinion of Dr. Renn, as Dr. Renn relied on Dr. Naeye's opinion that the miner's coal workers' pneumoconiosis was very mild, despite the reports of Drs. Sobieski and Stefanini that the lung tissue seen on biopsy demonstrated very severe features of coal workers' pneumoconiosis. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Toler*, 43 F.3d at 116, 19 BLR at 2-83; *Scott*, 289 F.3d at 270, 22 B.R at 2-384. Consequently, we hold

⁸ The administrative law judge surmised that Dr. Naeye did not offer an opinion as to whether coal workers' pneumoconiosis caused the miner's death because Dr. Naeye found that the miner's coal workers' pneumoconiosis was very mild. Decision and Order at 16. The administrative law judge however, rejected Dr. Naeye's finding that the coal workers' pneumoconiosis was mild, in light of the contrary opinions of Drs. Sobieski and Stefanini. *Id.*

that the administrative law judge properly found that the evidence established death causation at Section 718.205(c), by crediting the opinions of Drs. Gaziano, Sobieski, and Stefanini over the opinions of Drs. Renn and Naeye. We, therefore, affirm the administrative law judge's award of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Lifetime and Survivor Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge